

Australian High Commission, Kuala Lumpur

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"Recognising hidden victims in our legal system"

[Pathways for victims of domestic violence within the Australian and Malaysian legal systems: civil remedies, the criminal law and criminal trial procedure]

The Hon Justice Michelle Gordon

Domestic violence is a universal problem. In 2013, the World Health Organization described domestic violence as "a global public health problem of epidemic proportions" which requires "urgent action"¹. The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW")², of which both Australia and Malaysia³ are signatories, requires states to act to protect women against violence of any kind within the family, at the work place, or in any other area of social life.

¹ World Health Organization, *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence*, (2013) at 3.

² Done at New York on 18 December 1979.

³ Malaysia's accession is subject to a reservation by which it considers itself bound only insofar as the provisions of CEDAW do not conflict with Sharia law. That reservation was withdrawn, in part, in February 1998: see *Declarations, Reservations and Objections to CEDAW* at <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>>

The invisibility of domestic violence compounds its pervasiveness and intractability. How do public institutions deal with a problem which occurs in private? Legislative and judicial intervention into that private sphere has often been cautious. Nonetheless, over the past decades, legal systems across the globe have taken steps to recognise and address domestic violence.

In Malaysia, the enactment of, and various amendments to, the *Domestic Violence Act* 1994 (Malaysia) ("the DVA") have been a significant development in implementing and enhancing civil remedies for victims of domestic violence.

In Australia, there is federal legislation enacted by the Commonwealth Government which deals with issues of family violence and child abuse⁴. State and Territory governments in Australia have also enacted legislation specifically directed at assisting victims of domestic and sexual violence⁵. Further, it has

⁴ Part VII of the *Family Law Act* 1975 (Cth). The *Family Law Legislation Amendment (Family Violence and Other Measures) Act* 2011 (Cth) introduced a number of reforms relevant to domestic violence, including expanding the definition of "family violence" in s 4(1) to include concepts such as "coercion" and "causing fear".

⁵ *Family Violence Act* 2016 (ACT); *Crimes (Domestic and Personal Violence Act)* 2007 (NSW); *Domestic and Family Violence Act* 2007 (NT); *Intervention Orders (Prevention of Abuse) Act* 2009 (SA); *Family Violence Act* 2004 (Tas); *Family Domestic and Family Violence Act* 2008 (Vic); *Restraining Orders Acts* 1997 (WA).

been recognised that procedures for criminal trials need to be adapted to accommodate victims of domestic violence⁶.

The problem of domestic violence has been recognised by both of our legal systems. There is benefit, I believe, in sharing and learning from each other's experiences.

Defining violence

I will start with what I see as the first challenge: how to define the problem of domestic violence – both words are important. How does one define a problem which occurs in the private sphere, and affects different social, cultural and religious groups, in different ways?

The *United Nations Declaration on the Elimination of Violence against Women* defined *violence against women* as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life"⁷.

⁶ See Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114, (2010) at Ch 13.

⁷ Art 1 of the *United Nations Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 48th sess, 85th plen mtg, UN Doc A/RES/48/104 (23 February 1994).

Both of our legal systems recognise that acts of domestic violence are not confined to physical harm⁸. Emotional and psychological abuse, although in some instances more difficult to detect, are no less destructive. In Australia, State legislatures have defined domestic violence as extending beyond physical abuse to economic abuse and emotional or psychological abuse⁹.

[For example, the domestic violence legislation in the State of Victoria defines emotional or psychological abuse as behaviour that "torments, intimidates, harasses or is offensive to the other person"¹⁰. And the domestic violence legislation in the State of Western Australia provides that "repeated derogatory remarks" constitute domestic violence¹¹.]

In Malaysia, the definition of "domestic violence" under the DVA has developed since its enactment and also embraces a wide notion of "violence"; that is, beyond physical abuse or harm. Amendments to the DVA in 2012 included new subsections to the

⁸ In Malaysia, see s 2(c), (f) of the DVA. In Australia, see, eg, s 7 of the *Family Violence Protection Act 2008* (Vic); s 5A(2)(d) of the *Restraining Orders Act 1997* (WA).

⁹ See s 8(1)(a)(iii) and (iv) of the *Family Violence Act 2016* (ACT); s 9(3)(d) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW); s 5(c), (e) of the *Domestic and Family Violence Act 2007* (NT); s 8(1)(b)-(c) of the *Domestic and Family Violence Protection Act 1989* (Q); s 8(1) and (2) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA); ss 8 and 9 of the *Family Violence Act 2004* (Tas); ss 5(1)(a)(ii) and (iii), 6 and 7 of the *Family Violence Protection Act 2008* (Vic); s 5A(2)(c), (d), (g)-(i) and (k) of the *Restraining Orders Act 1997* (WA).

¹⁰ s 7 of the *Family Violence Protection Act 2008* (Vic).

¹¹ s 5A(2)(d) of the *Restraining Orders Act 1997* (WA).

effect that psychological and emotional abuse is now recognised as one of the types of domestic violence under the DVA¹².

Defining domestic relationship

Defining what constitutes a *domestic relationship* is also difficult. Relationships are subjectively experienced and perceived. Human experience dictates that domestic relationships will mean different things to different social, cultural and religious groups. And, in some instances, domestic relationships may even mean different things to the *same* social, cultural and religious groups.

In Australia, the state legislatures have enacted broad definitions of what constitutes a "domestic relationship". In one of the states in Australia – New South Wales – a person has a "domestic relationship" with another person if the person is or has been married to, or a de facto partner, of that other person; or a person with whom the victim has had an intimate personal relationship, whether or not the intimate relationship involves or has involved a relationship of a sexual nature¹³. The definition also extends to persons who live in the same household, have lived in the same long-term residential facility, or persons who have a

¹² See s 2(a)(iv)(f) of the *Domestic Violence (Amendment) Act 2012* (Malaysia) ("the 2012 Amending Act") inserting, inter alia, s 2(f) of the DVA.

¹³ s 5(1)(a)-(c) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

relationship involving ongoing paid or unpaid care¹⁴. In relation to indigenous Australians, the definition extends to a person who has been part of the extended family or kin of the other person according to the kinship system of the victim's culture¹⁵.

Legal recognition of domestic violence

As well as enacting civil remedies, both Australia and Malaysia have drawn upon the criminal law to recognise and address domestic violence.

In Australia, most of the civil remedies enacted by state legislatures expressly recognise that a victim may bring concurrent criminal and civil proceedings in relation to domestic violence¹⁶. Some state domestic violence legislation expressly links the definition of domestic violence to the criminal law. The state legislatures have also drawn upon the criminal law to shape the definitions of domestic violence under state domestic violence legislation.

For example, in Victoria, the domestic violence legislation defines "family violence" by reference to the definition of "assault"

¹⁴ s 5(1)(d)-(f) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

¹⁵ s 5(1)(h) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

¹⁶ See s 81 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW); s 138 of the *Domestic and Family Violence Protection Act 1989* (Q); s 155 of the *Family Violence Protection Act 2008* (Vic).

in Victorian criminal legislation¹⁷. In Western Australia, the domestic violence legislation defines "personal violence" by reference to the definition of "assault" in the Western Australian criminal legislation¹⁸.

In New South Wales, a "domestic violence offence" is a "personal violence offence" where the requisite domestic relationship exists, and what amounts to a "personal violence offence" is defined by reference to a wide range of offences under the *Crimes Act 1900* (NSW) ("NSW Crimes Act")¹⁹. Without listing all of the criminal offences, some include: wounding or grievous bodily harm²⁰; assault even where no actual bodily harm is inflicted²¹; sexual and indecent assault²²; causing sexual servitude²³; and recording and/or distributing an intimate image without consent or threatening to do so²⁴.

¹⁷ Pursuant to s 5(2) of the *Family Violence Protection Act 2008* (Vic), "assault" is included as a type of behaviour amounting to "family violence" and, under s 4 of that Act, as having the same meaning as in s 31 of the *Crimes Act 1958* (Vic).

¹⁸ These terms appear in the definition of "personal violence" in s 6 of the *Restraining Orders Act 1997* (WA), which is defined in s 3 by reference to the *Criminal Code* (WA).

¹⁹ ss 4 and 11(1)(a) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

²⁰ ss 33 and 35 of the NSW Crimes Act.

²¹ s 61 of the NSW Crimes Act.

²² ss 61I and 61L of the NSW Crimes Act.

²³ s 80D of the NSW Crimes Act.

²⁴ ss 91P, 91Q and 91R of the NSW Crimes Act.

In Malaysia, the criminal law also affords recognition to victims of domestic violence. The 2012 amendments were to the effect that acts related to domestic violence were to be deemed to be "seizable" offences under the Criminal Procedure Code²⁵, thereby linking the civil offence under the DVA to the criminal law.

I understand that the consequence of recognising domestic violence as a "seizable" offence is that police officers may intervene for the purpose of preventing the commission of domestic violence, and may make an arrest on reasonable suspicion of a relevant offence *without* orders from a Magistrate²⁶. Police officers of certain seniority may, without the order of a public prosecutor, exercise all or any of the special powers in relation to police investigations under Chapter XIII of the Criminal Procedure Code²⁷. Importantly, deeming domestic violence to be a "seizable" offence imposes an obligation on police officers to conduct immediate investigations upon suspicion of domestic violence, unless otherwise ordered by the public prosecutor²⁸.

As is self-evident, domestic violence can and does mean different things in different legal systems. Both of our legal systems have made laudable efforts to recognise domestic violence. But the task of recognising, and addressing, domestic violence is inherently

²⁵ See s 18 of the 2012 Amending Act inserting, inter alia, s 18A of the DVA.

²⁶ ss 103 and 105 of the *Criminal Procedure Code* (Malaysia).

²⁷ s 109 of the *Criminal Procedure Code* (Malaysia); see also at Ch XIII.

²⁸ s 110 of the *Criminal Procedure Code* (Malaysia).

difficult. The task requires our legal systems to capture the diversity of human experience, with respect to the very personal matters of the home, and familial and intimate relationships. On one view, the nature of this task calls for broad and flexible definitions which cater for diverse human experiences. It is an area that requires and demands constant review and discussion.

Enforcement

This brings me to the next issue. Once the extent of the problem has been properly defined, and the legislature has enacted civil remedies directed at reducing it, how then is this legislation enforced? Once the criminal law affords recognition of domestic violence, how then does a victim enforce their legal rights? Are criminal trial procedures appropriately adapted to enable victims to enforce these rights?

Recognising the problem is the first step. Once the problem has been recognised, the difficulty then lies in developing new methods, and adapting existing criminal law procedures, to address the problems, some of which are unique to this area of the law. We must ask ourselves – how can the law provide victims of domestic violence with the tools they need to survive? Are these tools accessible? And do our enforcement agencies have the relevant knowledge and skills to respond?

To this end, both Australia and Malaysia have made significant advances in the past decades. Both of our legal systems provide mechanisms for victims of domestic violence to obtain protection orders, or for protection orders to be obtained on their behalf.

In Australia, domestic violence legislation provides for protection orders to be obtained by way of application to a court, and, in some circumstances, provisional orders may be made by senior police officers.

For example, in New South Wales, a court may, on application, make an apprehended domestic violence order, referred to as an "ADVO", if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear that the person against whom the order is sought will commit an act of domestic violence against them, or will intimidate or stalk them²⁹. In most cases, the relevant court will also need to be satisfied that the person *in fact fears* the commission of such an act. If the person is a child, or if, in the opinion of the court, the person has been subjected on more than one occasion to conduct amounting to domestic violence and other criteria are met, it will not be necessary to establish that the fear in fact exists. In deciding whether or not to make an ADVO, the court

²⁹ s 16(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

must consider the safety and protection of the person and any child directly or indirectly affected³⁰.

Significantly, the standard of proof to obtain an ADVO under state domestic violence legislation is the balance of probabilities³¹. This is a less onerous standard than that of the criminal law which requires proof beyond reasonable doubt. Therefore, the ADVO process enables victims of domestic violence to obtain some form of legal redress without becoming embroiled in criminal law proceedings.

In both Australia and Malaysia, there has been a recognition that the effective enforcement of domestic violence legislation requires that the remedies it provides are appropriately adapted to the nature of the problem.

In New South Wales, the domestic violence legislation provides that senior police officers may make interim or provisional ADVOs. This mechanism recognises the need for expediency and simplicity in protecting victims of domestic violence. A police officer may apply by telephone or other communication device to an authorised officer or a senior police officer for an interim ADVO³² if an incident occurs involving the person for whom the provisional order is sought, and the police officer has good reason to believe that a provisional

³⁰ s 17(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

³¹ s 16(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

³² s 25 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

order needs to be made immediately to ensure the safety and protection of the person³³. An application may be made at any time, and whether or not the court is sitting³⁴.

This highlights the important role of police officers in helping victims access the legal system. In Australia, obligations are imposed on police officers to investigate suspected domestic violence. For example, in Victoria, police are required under the *Code of Practice for the Investigation of Family Violence* to respond to incidents of violence, and if certain conditions are met, to seek an intervention order on a victim's behalf³⁵. Ensuring our police force is equipped with the appropriate skills to assist victims, and deal with matters sensitively and professionally, is a significant factor in facilitating access to the legal system. This is particularly so given that an interaction with a police officer may be the victim's first encounter with the legal system.

In Malaysia, recent amendments to the DVA, which came into effect on 1 January this year³⁶, introduced Emergency Protection Orders or "EPOs"³⁷. These amendments allow social welfare officers

³³ s 26 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

³⁴ s 26(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

³⁵ Victoria Police, *Code of Practice for the Investigation of Family Violence*, 3rd ed (2017) at 38 [5.2.2]. See also s 15(e) of the *Personal Safety Intervention Order Act 2010* (Vic).

³⁶ See *Malaysia Government Gazette*, 23 December 2017, PU (B) 601/2017.

³⁷ See *Domestic Violence (Amendment) Act 2017* (Malaysia) ("the 2017 Amending Act").

to grant victims protection against their abusers³⁸. An EPO may be made regardless of whether there is an interim protection order or protection order previously made or pending under the DVA³⁹. An EPO is valid for seven days from the date of issue and enforceable when a copy of the order is served on the alleged abuser⁴⁰. Service must be carried out by police, in person, on the person against whom the order is made, within 12 hours of the police receiving a copy of the order⁴¹. Any individual who wilfully contravenes an EPO is liable to pay a fine of not more than 2000 ringgit or to imprisonment for a term not exceeding six months, or both⁴².

These amendments recognise not only the need for expediency and simplicity when fashioning methods to protect victims of domestic violence, but also the sensitivity of the subject matter. Drawing upon the expertise of social welfare officers, who have the skills to elicit information from victims, in circumstances where the victim may be reluctant to verbalise the issue due to social, religious or cultural pressures, is a commendable step.

³⁸ s 3 of the 2017 Amending Act inserting, inter alia, s 3A of the DVA.

³⁹ s 3 of the 2017 Amending Act inserting, inter alia, s 3A(2) of the DVA.

⁴⁰ s 3 of the 2017 Amending Act inserting, inter alia, s 3A(8) of the DVA.

⁴¹ s 3 of the 2017 Amending Act inserting, inter alia, s 3B(2) of the DVA.

⁴² s 3 of the 2017 Amending Act inserting, inter alia, s 3E(1) of the 2017 Amending Act.

The success of any legal system in protecting victims of domestic violence in many respects hinges upon the ability of the system to recognise the sensitivity of the subject and, in doing so, empower victims to engage with the legal system.

Criminal trial procedures

On one view, the challenge of dealing with the sensitivity of this subject matter is most stark in the context of criminal trials.

The criminal law system requires complainants to undertake the confronting task of providing evidence, where they must recount and relive traumatic experiences, in a public forum.

The Australian legal system has implemented a number of measures, through criminal codes and criminal procedure legislation, to deal with domestic violence issues sensitively.

State legislation allows for the complainant in a trial of a sexual offence to give their evidence by means of a closed-circuit television from a location separate to the courtroom⁴³. This avoids the situation where the victim is confronted by the accused. Further, the complainant is entitled to have a support person present

⁴³ See, eg, s 43 of the *Evidence (Miscellaneous Provisions) Act 1991* (Act); s 306ZB of the *Criminal Procedure Act 1986* (NSW); ss 21A(2)(a) of the *Evidence Act* (NT); s 8(2)(b)(ii) of the *Evidence (Children and Special Witnesses) Act 2001* (Tas).

with them when they give evidence⁴⁴ and the court will generally be closed during this time, whether evidence is given in the courtroom or by video link.

The complainant's evidence is often video-recorded and, in a number of Australian jurisdictions, the recording of the evidence may be tendered in evidence in later proceedings⁴⁵. This avoids the complainant needing to go through the stressful experience of providing evidence a second time. These are practical measures. They are the start, not the finish, of seeking to recognise and address not only the perpetrators but also the victims of domestic violence.

For example, a 2010 report by the Australian Law Reform Commission and the New South Wales Law Reform Commission observed that victims of domestic violence are faced with a number of evidentiary issues. It may be difficult to prove specific incidents of domestic violence in the course of ongoing violence to the requisite standard because victims may be unable to recall the dates or times of particular incidents and victims may not have reported

⁴⁴ See, eg, s 38E of the *Evidence (Miscellaneous Provisions) Act* 1991 (ACT); s 291(1) of the *Criminal Procedure Act* 1986 (NSW); ss 21A(2)(c) of the *Evidence Act* (NT); ss 4 and 8(2)(b)(i) of the *Evidence (Children and Special Witnesses) Act* 2001 (Tas); s 133 of the *Criminal Procedure Act* 2009 (Vic).

⁴⁵ ss 306E-306G of the *Criminal Procedure Act* 1986 (NSW); ss 21E(4)-(6) of the *Evidence Act* (NT); s 21A(6)(b) of the *Evidence Act* 1977 (Q); s 13D of the *Evidence Act* 1929 (SA); s 7B of the *Evidence (Children and Special Witnesses) Act* 2001 (Tas).

incidents at the time due to fear, or a desire to protect the person committing the violence⁴⁶.

Other issues are that evidence of victim's disclosures to third parties, such as friends or counsellors, may be inadmissible as hearsay evidence. Corroborating evidence, such as neighbours overhearing an incident, or children witnessing an incident, may be of limited probative value. In some circumstances, there may be no evidence at all of injuries or harm suffered at the time a complaint is made, particularly where non-physical abuse is alleged⁴⁷.

These issues make clear that this is an area that requires constant review and discussion.

Part of the discussion involves considering the developments in other jurisdictions, as we are doing here today. Looking outwards, to jurisdictions other than our own, a development in the United Kingdom is worthy of mention. In 2015, the United Kingdom introduced into its criminal code a specific offence titled "controlling or coercive behaviour in an intimate or family relationship"⁴⁸.

⁴⁶ Australian Law Reform Commission, *Family Violence — A National Legal Response*, Report No 114, (2010) at 563-564 [13.7]-[13.9].

⁴⁷ Australian Law Reform Commission, *Family Violence — A National Legal Response*, Report No 114, (2010) at 563-564 [13.7]-[13.9].

⁴⁸ See s 76 of the *Serious Crime Act 2015* (UK).

Broadly, the offence is that, a person – the accused – commits an offence if he or she "repeatedly or continuously engages in behaviour towards [the complainant] that is controlling or coercive"⁴⁹. There are other elements: that at the time of the behaviour, the accused and the complainant are personally connected⁵⁰; that the behaviour has a "serious effect" on the complainant and that the accused "knows or ought to know that the behaviour will have a serious effect" on the complainant⁵¹.

It is important that we keep apprised of these developments, in other jurisdictions, to inform our own discussions.

Legal mechanisms to recognise victims of domestic violence are only effective if they are correctly applied and observed. The true measure of the success of our efforts to improve our legal system is through critical analysis of their application. We must ask ourselves: how is the victim affected? In practice, is our criminal justice system addressing and meeting its objectives? Critical analysis of our shortcomings is a necessary, and ongoing, task.

A further task is to keep apprised of the changing nature of the conduct itself. Technology and social media infiltrate our day to

⁴⁹ s 76(1)(a) of the *Serious Crime Act 2015* (UK).

⁵⁰ s 76(1)(b) of the *Serious Crime Act 2015* (UK).

⁵¹ s 76(1)(c) and (d) of the *Serious Crime Act 2015* (UK).

day lives. Unfortunately, these tools may be used as weapons by perpetrators of domestic violence. Some legislative developments have been made to address this. For example, by defining recording and/or distributing an intimate image without consent, or threatening to do so, as a domestic violence offence⁵². The task of recognising domestic violence must evolve and adapt with these, and other, changes in our society.

Where to from here?

Both Australia and Malaysia have made significant advances in making victims of domestic violence visible in our respective legal systems.

Those fortunate enough not to have been affected by domestic violence cannot begin to comprehend the issue. We cannot possibly develop legal solutions if we do not continue to improve our understanding of domestic violence and the experiences of, and difficulties faced by, its victims.

In Australia, two recent tragic examples come to mind. First, in 2014 a woman's son was murdered by his father at a children's sports game. At that point in time, the woman was in the process of seeking and clarifying intervention orders⁵³. Second, in 2015,

⁵² ss 91P, 91Q and 91R of the NSW Crimes Act.

⁵³ Fisher, "Family Violence and Protection Orders in the Australian Capital Territory", (2015) 13 *Canberra Law Review* 28 at 29-30.

a woman was murdered by her husband, just one day after obtaining a protection order⁵⁴.

I raise these examples to remind us that the experience of the victim must be kept in sharp focus. The task of developing our legal systems requires the same sharp focus.

The best way forward, to enhance our understanding and the effectiveness of our legal systems and the plight of the victims of domestic violence, is through conversations. It is through our continued conversations in forums such as these, within our community, within our professions, within our families and with our friends that we can work to ensure that victims of domestic violence are no longer hidden; that the victims are empowered to speak up and seek assistance and, no less significantly, what is inappropriate behaviour is identified and discussed. We need to teach our children, our partners, our families and our community that domestic violence is not okay. Publicity is often a remedy for social and industrial diseases⁵⁵. Domestic violence is such a disease. We need to discuss, publicise and address the causes, the symptoms and what we are doing to address the disease.

⁵⁴ Fisher, "Family Violence and Protection Orders in the Australian Capital Territory", (2015) 13 *Canberra Law Review* 28 at 37.

⁵⁵ Brandeis, *Other People's Money: And How the Bankers Use It*, (1914) at 92.